JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1008~~ 122

R. P. ANDERSON, ET AL., PETITIONERS,

v.

BRIGADIER GENERAL L. E. SEEMAN, DIVISION ENGINEER, SOUTHWEST DIVISION CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 13, 1958.

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[1] R. P. Anderson and fifty-five other individual plaintiffs (R. 4) and nine interveners-plaintiffs, six individuals and three corporations. (R. 33).

Citations to Opinions Below

The opinion of the District Court (R. 30-32) is unreported. The opinion of the Court of Appeals, printed in Appendix B hereto, *post* p. A15, is reported at 252 F. 2d 321.

Jurisdiction

The judgment of the Court of Appeals was entered on February 13, 1958. R. 58; *post* p. A29. Rehearing was denied on March 27, 1958, R. 72. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Constitutional and Statutory Provisions Involved

In this petition the main question presented involves the scope of the commerce clause, Article I, Section 8, Clause 3 of the United States Constitution, and the due process clause of the Fifth Amendment to that Constitution. Appendix A, *post* p. A14. In main the statutory provisions involved are contained in the Rivers and Harbors Act of 1945, 59 Stat. 10, Appendix A, *post* p. A1. Involved in the question of statutory construction, presented in the Petition for Writ of Certiorari in the companion case of *Neches River Conservation District v. General Seeman et al.*, are the Texas Constitution, Art 16, Section 59, and the several Texas statutes listed on page 3 of the NRCD petition for a writ of Certiorari, quoted in Appendix A to that petition.

Questions Presented

1. Petitioners having alleged that the proposed power increment of McGee Bend dam would entail an economic loss and would not benefit flood control or navigation, *and* that there is, and was, no basis for findings to the contrary by Congress, are petitioners entitled to a trial on the proofs?

2. Whether under the Rivers and Harbors Act of 1945 respondents are authorized to construct McGee Bend dam and reservoir on the Angelina River in Texas without first obtaining a permit from the Board of Water Engineers of Texas.

Statement

Two actions were filed in the United States District Court, one by the Neches River Conservation District of Texas, hereinafter called NRCD, the other by petitioners, 62 individuals and 3 corporations, whose lands will be inundated by McGee Bend Reservoir, Angelina River, Texas, if the hydroelectric power segment is included. Both actions are against the Southwest Divison Engineer and District Engineer, Corps of Engineers, U. S. Army, in charge of construction. In both suits plaintiffs allege that the Rivers and Harbors Act of 1945, under which defendants are acting, in effect requires a permit (not issued) from the Texas Board of Water Engineers before defendants may impound the waters or control the flow of the stream. (R. 6-7; 15-16; 22). This turns on a question of statutory construction. Since that question

(Question 2 herein presented, *ante* p. 3) is fully presented in the petition for certiorari of NRCD, petitioners herein (Anderson et al), to avoid needless repetition, refer to and adopt the NRCD petition, pages 7-14. In the present case (Anderson et al) jurisdiction of the district court was invoked because the case arises under the Federal Constitution and statutes, and the matter in controversy as to each plaintiff exceeds, exclusive of interest and costs, the sum of $3,000,00. (R. 5, 11, 19).

In addition to the tender of the above statutory question (common to the two cases) petitioners herein (Anderson et al) alleged:

> "The power increment does not contribute to either navigation benefits or flood control benefits. Insofar as it would have any effect at all on flood control or navigation, it would be detrimental, in that the larger reservoir would tend to increase both the peak flood flow and the total run-off which must be provided for in the design for flood control. There is no reasonable basis for contrary findings. Annual power benefits of approximately $989,800 is the maximum that could be directly assigned to the proposed hydro-electric power feature. The minimum annual cost of the power segment is approximately $1,191,300. This shows a maximum benefit cost ratio of approximately 0.75. At all events the benefit cost ratio is less than unity. The hydro-electric power segment is not economically justified. There is no basis of fact upon which Congress could reasonably conclude that it is. Such a conclusion would be palpably without reasonable foundation. In the

circumstances the construction of such a dam with the hydro-electric increment is beyond the powers delegated to Congress by the Constitution. Consequently, the purpose for which defendants propose and are threatening to take plaintiffs' lands is not a public purpose, and such taking would . . . deprive plaintiffs of their property without due process of law, in violation of the 5th Amendment to the Constitution of The United States." (R. 7-8, original plaintiffs; 16-17 and 23-24, substantially identical allegations by interveners-plaintiffs).

Respondents moved to dismiss plaintiffs' and interveners' actions on the grounds: (1) the complaint fails to state a claim upon which relief can be granted; (2) the action is in reality a suit against the United States, an indispensable party, which has not waived immunity; (3) the Secretary of the Army is an indispensable party; (4) the court is without jurisdiction to enjoin discretionary acts of government officers; (5) injunction can not be granted because the complaint fails to allege that irreparable injury will ensue, or that plaintiffs, or interveners, have no plain, adequate and complete remedy at law; and (6) since the United States is not a party, relief against defendants would be futile. (R. 25, 27, 29). The motions to dismiss were granted on May 20, 1957 (R. 34). Opinion of the district judge was filed on June 17, 1957. (R. 30-32).

On February 13, 1958, the Court of Appeals affirmed the judgment of the District Court dismissing the action (R. 58) for the reasons stated in its opinion, *Anderson v. Seeman*, 252 F. 2d 321 (R. 45),

(Appendix B, *post*, p. A15.) Noting that defendants stated that the parties questions turned on the merits, the Court of Appeals, holding that under plaintiffs' pleadings the district court had jurisdiction, ruled upon the merits. 252 F. 2d 322-323; (R. 46-47; *post*, pages A16-17.)

Reasons for Granting the Writ

(In addition to reasons 1 and 2 in the petition for certiorari in the companion NRCD case, pages 7-14)

The decision of the court below is believed to be in conflict with the implications of *United States v. Appalachian Power Co.*, 311 U. S. 377, 426, where the Court first announced, and of *Oklahoma v. Atkinson Co.*, 313 U. S. 508, 525, and *United States v. Twin City Power Co.*, 350 U. S. 222, 224, where the Court twice re-affirmed that: "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." [2] And in *Oklahoma v. Atkinson*, *supra*, page 529, the Court added: "Furthermore, it is plain from the Report that the construction of the project so as to accomodate power will increase or augment some of the flood-control benefits, including river flow, which would accrue were the dam to be erected for flood control only."

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[2] Indeed, Congress had itself recognized this principle by express declaration in the Boulder Canyon Project Act. Among the purposes of that project Congress listed "the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking." *Arizona v. California*, 283 U. S. 423, 448-449.

Hitherto this Court has not sustained the development of water power as one of the "parts of commerce control" *unless* it would contribute toward "recovery of the cost of improvements" *or* would aid flood control or navigatiion.

In *Oklahoma v. Atkinson*, 313 U. S. 508, the Red River case, this test was satisfied. In the present case the complaint charges that the development at McGee Bend Dam of hydroelectric power, thereby inundating plaintiffs' lands, would satisfy neither of these prerequisite conditions, *and* that under the facts Congress could not possibly conclude that any of them was met. No such allegation was made in *Oklahoma v. Atkinson.*

Petitioners recognize that if the question of whether power development at McGee Bend meets the above test lies within the realm of Congressional judgment or discretion, the decision of Congress is conclusive. But here the complaint charges that there is no basis upon which Congress could have concluded or could now conclude that development of power at McGee Bend would contribute to the cost of the improvements *or* to flood control or navigation benefits. The factual basis for this charge is also pleaded. *Ante* pp. 4-5. Petitioners do not propose merely to embark upon a trial *de novo* of an *issue* upon which reasonable minds might differ. They propose to demonstrate that in this instance the Congressional decision "involves an impossibility." *Old Dominion Co. v. United States*, 269 U. S. 55, 66, *per* Mr. Justice Holmes.

Development of power at McGee Bend was sustained by the Court of Appeals because petitioners

failed to allege that power development *at the four dams on the two rivers* would yield a net loss, *and* because, as the Court viewed it, the Report (S. D. 98) showed that, on balance, estimated overall benefits would exceed estimated costs. But petitioners submit that there is no precedent for sustaining a burdensome power development at McGee Bend. If it imposes an economic burden upon the project *and* is of no benefit to flood control or navigation, it is perforce of no benefit to the project and is not "a part of commerce control."

The Court of Appeals undertook to meet this by pointing to recitals in the Report (S. D. 98) that "the district engineer concludes that" (taking into account *estimated over-all* benefits, including wild life conservation and recreational purposes, pollution abatement, navigation, flood protection, water for municipal and industrial uses and for irrigation, hydroelectric power, and others incidental to those listed) "the benefits to be derived from the proposed improvements would greatly exceed the costs." *Anderson v. Seeman*, 252 F. 2d 321, 326-327; Appendix B, *post*, p. A27. That, we submit, is not the test of whether hydroelectric power may be included at McGee Bend. On that theory the development of hydroelectric power at a net loss of millions, with *no* compensating benefits to flood control or navigation, becomes a part of commerce control if, notwithstanding the *waste*, the "whole project" yields *estimated total* benefits (to wildlife, recreation, etc.,) in excess of estimated costs. This is not an application of *Oklahoma v. Atkinson*, *supra*; it is an extension of it, transgressing the implicit limits of that decision.

Senate Document 98 is Consistent with Petitioners' Allegations

The Rivers and Harbors Act of 1945 makes explicit reference to Senate Document 98, 76th Congress (herein called S. D. 98) in connection with "Neches and Angelina Rivers, Texas." (Appendix A, *post* pp. A6-14). Apparently this report of the War Department's survey and recommendations concerning the two rivers served "as the broad definition of the project which was authorized by the Act," as did H. Doc. 541, 75th Cong., concerning the Denison Dam-Red River project. *Oklahoma v. Atkinson*, 313 U. S. 508, 513. In the circumstances, regardless of whether the 1945 Rivers and Harbors Act was or was not "pleaded" by plaintiffs, S. D. 98 was a source of information available to Congress. Petitioners do not undertake the bootless task of contending that Congress could not possibly rely upon S. D. 98. However, S. D. 98, as we read it, is not in conflict with the allegations of petitioners' complaint above quoted, pages 4-5. It is well enough to defend whatever Congress does in the interest of flood control and navigation. These are "parts of commerce control," as is "recovery of the cost of improvements through utilization of power" *U. S. v. Appalachian Power Co.*, 311 U. S. 377, 426. And utilization of power (regardless of economic consequences) to augment flood control or navigation benefits is also a part of commerce control. But S. D. 98 does not recommend utilization of power at McGee Bend for any such purpose.

These are the portions of S. D. 98, dealing explicitly with hydroelectric power: "This study was

undertaken to determine the benefits that would be derived from power development on the Neches and Angelina Rivers, Tex., in connection with storage for navigation, flood control and conservation in the Rockland and McGee Bend Reservoir projects. Two lower dams designated herein as projects A and B have been included in the study because they would produce a gross annual income from power in excess of their annual charges, and project B is considered desirable for the additional reason that it will regulate the daily fluctuation in the turbines installed at the upper projects and thus stabilize the flow of the lower river." (S. D. 98, p. 48). *The document contains no statement of similar import concerning McGee Bend Reservoir.*

Proceeding, the Report says: "Project A: * * * This project was included in the plan of improvement because it would yield a net power revenue to apply as credit on the annual charges against the entire project. This project is designed to operate synchronously with the Rockland project." (S. D. 98, p. 51. [Rockland and Project A have been indefinitely postponed. Project B has been completed. Approximately $6,500,000 has been appropriated toward McGee Bend project. Estimated cost of McGee Bend project, with power, will exceed $50,000,000; without power, less than $30,000,000.]

"Project B: This project consists of a channel dam with movable gates, a levee across the river to provide a small amount of pondage and a powerhouse. The dam is located on the Neches River 12.4 miles below the mouth of the Angelina or at river mile 113.7. The function of this reservoir is mainly

to regulate the daily fluctations in discharge from the turbines in the upper projects [Rockland and McGee Bend] when they are developing power under a 25 per cent load factor. This regulation is deemed advisable in the interest of navigation, and in the interest of insuring a regular supply of water for irrigation and municipal uses in the lower portion of the river. It will be necessary therefore to operate this project on a 100 percent load factor which will have the effect of limiting the installation and thereby reducing its power value. But notwithstanding this limitation, the project has an average annual gross power value slightly in excess of its annual carrying charges, and is therefore a financial asset to the project considered as a whole." (S. D. 98, p. 51). *Again, the Report is devoid of any such statement concerning McGee Bend.*

Finally, the Court of Appeals concluded that it could not "exercise a legislative judgment based on a complexity of engineering data, *Oklahoma v. Atkinson, supra, p. 527*, in order to ascertain just what part the top twenty-five feet of the dam contributes to the whole, either by increasing the power generated at its site or in stabilizing the flow to the generating sites down river, which are all parts of the same development." 252 F. 2d page 327; Appendix B, page A27. Touching this we comment: (a) By S. D. 98 it plainly appears that the proposed generation of power at McGee Bend will not stabilize the flow to the generating sites down river. On the contrary, the two smaller dams, A and B, "are necessary to utilize available head and to re-regulate the fluctuating discharge from the upstream power

plants [McGee Bend and Rockland] to give a uniform daily flow on the lower river." S. D. 98, page 7. (b) Petitioners by their complaints do not tender an issue of fact to be judicially resolved by weighing the testimony contained in S. D. 98 against engineering testimony in conflict with it. Petitioners propose to present evidence that has not been disputed by S. D. 98 or by other evidence that has been or could have been before the Congress. (c) Since the allegation is not contradicted or refuted by S. D. 98, it must for present purposes be accepted as true. Petitioners' pleadings entitle them to try their case "on the proofs." *Des Isles v. Evans*, 200 F. 2d 614, 615 (5 Cir.); *De Loach v. Crowley's, Inc.*, 128 F. 2d 378, 380 (5 Cir.) That their burden of proof is heavy is not a reason for foreclosing their right to discharge it if they can.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari has been served upon Respondents by depositing the same in a United States post office, with first class air mail postage prepaid, addressed to each of the counsel of record for respondents, namely, Messrs. Perry W. Morton, Assistant Attorney General, David R. Warner, Alfred H. O. Boudreau, Jr., Department of Justice, Washington; D. C., Heard L. Floore, United States Attorney, Fort Worth, Texas; and a copy to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

Ireland Graves
Counsel for Petitioner

APPENDIX A

1. **Rivers and Harbors Act of 1945, 59 Stat. 10, 79th Congress, 1st Session, March 2, 1945, Chapter 19—Public Law 14 [S. 35].**

An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

"In conformity with this policy—

"(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term 'affected State or States' shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and

such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal

and its attachment shall be printed as a House or Senate document.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water irrigation, mining, or industrial purposes.

"(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), amended, are hereby amended accordingly.

"Sec. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans and the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That no project herein authorized shall be appropriated for or constructed until six months after the termination of the present wars in which the United States is engaged unless the construction of such project has been recommended by an authorized defense agency and approved by the President as being necessary or desirable in the interest of the national defense and security, and the President has notified the Congress to that effect: *Provided further*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission, and such recommendations shall be based upon consideration of the proper utilization and conservation in the public interest of the resources of the region:

" * * * * * *

"Neches and Angelina Rivers, Texas, Senate Document Numbered 98, Seventy-sixth Congress; [59 Stat. 18]

" * * * * * * "

Senate Document No. 98

[Senate Document No. 98 is a report dated July 7, 1939, from the Chief of Engineers, U. S. Army, on re-examination, and preliminary examination and survey, of Neches River and tributaries, Texas, requested by resolution of the Committee on Commerce, U. S. Senate, adopted April 5, 1939, and authorized by the Flood Control Act, approved June 22, 1936, together with accompanying papers and illustrations. This was transmitted to the Chairman of the Committee on Commerce, U. S. Senate, with transmittal letter from the Secretary of War, dated July 19, 1939. The report consists of 62 pages with two maps appended. In view of its bulk, and since most of it is irrelevant, we print below only the portions that were relied upon by Respondents below and the portions referred to in the opinion of the Court below not quoted in that opinion or in the Petition for Certiorari, *ante*, pages 9-11. The portions set forth below are taken from the report of the District Engineer dated April 14, 1939, approved by the Division Engineer April 24, 1939.]

* * *

104. At present the contiguous territory is poorly developed but it is believed that the flood protection, the navigable channel, the assured water supply, and the electric power, that would be provided by the proposed project, would stimulate development of this area. * * *

* * *

122. *Power benefits, general.*—This study was undertaken to determine the benefits that would be

derived from power development on the Neches and Angelina Rivers, Tex., in connection with storage for navigation, flood control, and conservation in the Rockland and McGee Bend Reservoir projects. Two lower river dams designated here as projects A and B have been included in the study because they would produce a gross annual income from power in excess of their annual charges, and project B is considered desirable for the additional reason that it will regulate the daily fluctuation in discharge from the turbines installed at the upper projects and thus stabilize the flow of the lower river. * * *

* * *

131. *Power installation—Rockland.*—The minimum regulated discharge of 1,231 second-feet at Rockland would be released at the rate of 4,924 second-feet in the development of power on a 25 percent load factor. This rate of discharge would cause a tail-water elevation of 107 feet mean sea level and thus the minimum power head at Rockland would be (146-107) 39 feet. Under the assignment of space, as described in the preceding paragraph, the maximum power head would be (168-107) 61 feet. The range in power head would be (61-39) 22 feet, which is considered the maximum practicable limit of variation. Under the above conditions the power installation at Rockland would be (4,924 by 39/14.7) 13,060 kilowatts.

132. *Power installation — McGee Bend.* — The minimum regulated discharge at McGee Bend of 1,707 second-feet, would be released at the rate of 6,828 second-feet in the development of power on a

25 percent load factor. This rate of discharge would produce a tail-water elevation of 89 feet mean sea level at the powerhouse site. The minimum power head would therefore be (139-89) 50 feet. The maximum power head under the assigned conditions would be (167-89) 78 feet. The range in power head would be 78-50) 28 feet, which is considered the maximum practicable limit of variation. Under the above conditions, the power installation at McGee Bend would be (6,828 by 50/14.7) 23,220 kilowatts.

133. *Gross power value—Rockland and McGee Bend projects.*—An analysis of the Rockland mass curve shows that an installation of 13,060 kilowatts at the Rockland Dam could produce an average energy output of 66,200,000 kilowatt-hours for the 34.25-year period covered by the record, and a similar analysis of the McGee Bend mass curve shows that an installation of 23,220 kilowatts at the McGee Bend Dam could produce an average annual energy output of 106,500,000 kilowatt-hours for the 23-year period of record. The average annual gross power value of the Rockland and McGee Bend projects would therefore be as follows:

(a) Rockland project:	
13,060 kilowatts, at $12.50	$163,250
66,200,000 kilowatt-hours, at $0.0015	99,300
Average annual gross power value	262,550
(b) McGee Bend project:	
23,220 kilowatts, at $12.50	290,250
106,500,000 kilowatt-hours, at $0.0015	159,750
Average annual gross power value	450,000

(c) Rockland and McGee projects combined:

36,280 kilowatts, at $12.50	453,500
172,700 kilowatt-hours, at $0.0015	259,050
Total average annual gross power value	712,550

134. *Project A:* This project consists of a channel dam with movable gates and a powerhouse. It is located on the Neches River at river mile 142.0, about 22.5 miles below the Rockland Dam. The function of this project is limited to power development. Its purpose is to develop the available fall in the Neches River, below the Rockland Dam and above the tail water of the McGee Bend Dam. This project was included in the plan of improvement because it would yield a net power revenue to apply as a credit on the annual charges against the entire project. This project is designed to operate synchronously with the Rockland project. It would develop power on a 25 percent load factor and would thus discharge 4,924 second-feet when operating. The tail water at this rate of discharge would be at elevation 87 feet, mean sea level. The headwater has been placed at elevation 99.5 feet, which is the maximum limit that can be used without seriously backwatering the Rockland project. The normal operating head would therefore be 12.5 feet, and the installation would be 4,184 kilowatts for delivering power on a 25 percent load factor. The average annual energy output would be 14,260,000 kilowatt-

hours, and the average annual gross power value would be $73,690, as follows:

4,184 kilowatts, at $12.50	$52,300
14,260,000 kilowatt-hours, at $0.0015	21,390
Total average annual gross power value	73,690

Project A would be handicapped somewhat during periods of flood release from the Rockland Reservoir, but such times its load could be carried by one of the upper reservoirs which would then be operating under favorable head conditions and an abundant water supply. The energy of this project has therefore been classified as prime on a 25 percent load factor.

135. *Project B:* This project consists of a channel dam with movable gates, a levee across the river valley to provide a small amount of pondage, and a powerhouse. The dam is located on the Neches River 12.4 miles below the mouth of the Angelina or at river mile 113.7. The function of this reservoir is mainly to regulate the daily fluctuations in discharge from the turbines in the upper projects when they are developing power under a 25 percent load factor. This regulation is deemed advisable in the interest of navigation, and in the interest of insuring a regular supply of water for irrigation and municipal uses in the lower portion of the river. It will be necessary therefore to operate this project on a 100 percent load factor, which will have the effect of limiting the installation and thereby reducing its power value. But notwithstanding this limitation, the project has an average annual

gross power value slightly in excess of its annual carrying charges, and is therefore a financial asset to the project considered as a whole.

136. The headwater at project B has been fixed at elevation 81 feet mean sea level which is the maximum limit that can be used without seriously backwatering project A and the McGee Bend project. The project is designed to deliver the combined minimum regulated discharge from the Rockland and McGee Bend projects, which amounts to 2,938 second-feet on a 24-hour basis. The elevation of the tail water when this rate of discharge is maintained in the river would be 75 feet, mean sea level. The operating head under this condition would be 24 feet.

137. Using a head of 24 feet and a discharge of 2,938 second-feet and designing for a 100 percent load factor, the required installation would be 4,800 kilowatts. A duration curve of the combined outflow from the Rockland and McGee Bend projects has been delineated on plate 35.[1] This curve represents approximately the inflow into project B. There is also delineated on this plate the operating head that would be available for this project for various percentages of the time. It may be seen by reference to the head curve on this plate that the available head would be within practicable operating limits for 95 percent of the time, and that the average head for 100 percent of the time would be 21.3 feet. with the proposed installation of 4,800 kilowatts it was found that the average annual energy output for this project would be 37,300,000 kilowatt-hours at a 100 percent load factor. Therefore, the average annual

[1] Not printed.

gross power value for project B would be $115,950; as follows:

4,800 kilowatts, at $12.50	$60,000
37,300,000 kilowatt-hours, at $0.0015	55,950
Average annual gross power value	115,950

138. As may be seen from the curves on plate 35,[1] project B could not deliver strictly prime power. However, under the conditions when it would fail to deliver its quota of prime power, the upper projects at Rockland and McGee Bend would have favorable head conditions and an oversupply of water. Hence these upper plants can be designed to take over the load of this plant under flood conditions. Accordingly, the power output for project B has been classified and estimated as prime power on a 100-percent load factor. In further support of this procedure, it may be observed that the maximum load conditions in this section of the country usually occur during the summer months, when it is unlikely that flood conditions will prevail. It therefore appears improbable that the shutdown of this plant for flood conditions would have any serious effect upon its utility in feeding the load of any large system.

139. *Summary.*—The installation proposed for the several projects considered in this study and

[1] Not printed.

the average annual gross power values, therefore, are summarized in the following table:

Projects	Capacity of installation, kilowatts	Energy output, kilowatt-hours	Average annual gross power value
Rockland	13,060	66,200,000	$262,550
McGee Bend	23,220	106,500,000	450,000
A	4,184	14,260,000	73,690
B	4,800	37,300,000	115,950
All projects	45,264	244,260,000	902,190

140. *General note on gross power value.*—The gross power value of these projects was estimated in the above paragraphs by comparison with the cost of providing a steam plant of equal capacity. The fixed charges on the steam plant were estimated at $12.50 per annum per kilowatt of installed capacity, and the additional cost of generating electrical energy at 1.5 mills per kilowatt-hour. It is believed that the gross power value arrived at in this manner is conservative for this locality and that the potential market value for the output of these plants under the local conditions would be not less than $14.23 per kilowatt of installed capacity per annum for service charge plus 1.5 mills per kilowatt-hour for the total energy output. The application of these rates would increase the gross power value as estimated above by $70,000 and the net power value by a like amount. This estimate is based on a value of 8 mills per kilowatt-hour for prime energy deliverable under a 25 percent load factor and 1.5 mills per kilowatt-hour for surplus energy. However, we have used the more conservative estimate in our summary of the economic benefits of the project.

141. *Market for power.*—The locations of existing power lines and power generating installations for providing current for public use in the vicinity of the proposed dams are shown on plate 38.[1] Within 200 miles of the proposed dams are 10 public service companies and 1 municipality engaged in generating and distributing power. The total installed capacity of the concerns within this area is 662,700 kilowatts.

142. The total proposed installed capacity at the dams considered in this report is 45,264 kilowatts.[2] This would represent an increase of only 7 percent over the present installed capacity in the area. The rate of increase in installed capacity of public power in this area has been rapid during recent years. From a consideration of the foregoing it is concluded that the power that could be generated at the proposed dams could be readily marketed.

2. United States Constitution

Article 1, Section 8, Clause 3:

> "The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;"

Amendment V

> "No person shall be held * * *; nor shall any person, * * * be deprived of life, liberty or property, without due process of law; * * *."

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[1] Not printed.

[2] [The present proposed installed capacity at McGee Bend alone is approximately 45,000 kilowatts.]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16799

R. P. ANDERSON, ET AL,
Appellants,
versus

BRIGADIER GENERAL L. E. SEEMAN,
Division Engineer, Southwest Division,
Corps of Engineers, United
States Army, Et Al,
Appellees.

Appeal from the United States Disrtict Court for the Northern District of Texas.

(February 13, 1958.)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and HANNAY, District Judge.

TUTTLE, Circuit Judge: This is an appeal from a judgment of the trial court dismissing on motion of

the appellees this suit to enjoin the taking of appellants' lands for the building of a dam and reservoir on the Angelina River in Texas.

The complaint was filed by a number of plaintiffs whose land would be inundated by the construction of McGee Bend Reservoir. Their complaint is twofold: first, that the construction of this dam cannot legally proceed unless permission is obtained from the Board of Water Engineers of the State of Texas, which has not been done, and, second, that the lands of the complainants are in the upper limits of the contours which are included in the planned reservoir, that the "top segment" of the dam, and thus of the reservoir, is "to be added for the sole purpose of generating hydroelectric power," which is not a purpose for which Congress can constitutionally legislate, and that the law authorizing the condemnation is as to their lands unconstitutional.

It is not disputed that the Neches River, of which the Angelina is an important tributary, is a navigable river; for the purposes of the motion to dismiss it must be taken as true that the defendants, Division Engineer and District Engineer, United States Corps of Engineers, will, unless enjoined, condemn and take plaintiffs' lands.

Although the government asserts that the judgment of the trial court must be affirmed because (1) this is a suit against the United States which has not waived its immunity, and (2) being a suit against the United States, the Secretary of the Army is an indispensable party, we cannot pass on these questions in limine. This is so because the government's reliance on these grounds is based on its argument that

unless the statute authorizing the actions of the defendant is unconstitutional, or unless the officers' action is in excess of their statutory authority, then this is a suit against the United States.[1] In order to ascertain whether this is a suit against the United States, then we must go to the merits of the issue, i. e., is the threatened action either based on an unconstitutional statute or is it beyond the authority of a valid statute? Once we have decided that issue then the other questions become immaterial, for if we find the actions unauthorized, then by the Government's own definition this is not a suit against the Government, and if, to the contrary, we find the actions are neither unconstitutional nor beyond the statute, then the appellants lose on the merits. Since the complaint charged that the statute was unconstitutional and in the alternative that the actions of the defendants exceeded the statutory authority, the district court had jurisdiction of the suit.[2]

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[1] In its brief the Government says:

"Where suit is brought against government officers in their representative capacities, as here, the suit is one clearly against the United States unless the action of which complaint is made is in excess of the officers' statutory authority or unless it is taken under the authority of a statute which is unconstitutional. Larson v. Domestic and Foreign Commerce Corp. (1939), 337 U.S. 682 at 690."

[2] In State of Oklahoma v. Atkinson Co., 313 U.S. 508, the complaint was against a contractor and government lawyers engaged in condemnation proceedings. The three-judge district court specifically ruled that this was an appropriate method of trying out the issue of constitutionality of the statute and also its proper construction. 37 F. Supp. 93, 96. This judgment was affirmed by the Supreme Court without comment on this feature of the case. See also Colorado v. Toll, 268 U.S. 228, 230.

The complaint here pleads the Rivers and Harbors Act of 1945, 59 Stat. 10. Sec. 2 of the Act provides in part:

> "The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of National Security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, *in accordance with the plans in* the respective reports hereinafter designated and subject *to the conditions set forth therein:*
>
> . . . .
>
> "Neches and Angelina Rivers, Texas; *Senate Document numbered 98*, Seventy-sixth Congress;" (Emphasis here and hereafter in quoted material supplied.)

The plans, in accordance with which the adoption of this project was made by Congress are set out in Senate Document 98, which will be discussed below. In any event, it is clear that in construing the law and its scope both the text of the Act and the statement of purpose in the Senate Document are to be considered.

A further provision of the Rivers and Harbors Act upon which appellants rely is that which declares the policy of Congress to recognize the interests and

rights of the state in water utilization and control. Relevant parts of this declaration of policy are:

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> "In conformity with this policy—
>
> "(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control *not heretofore or herein authorized*, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a).
>
> . . . .
>
> "(b) *The use for navigation*, in connection with the operation and maintenance

of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian *shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States* lying wholly or partly west of the ninety-eighth meridian, *of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.*"

Dealing then with the first contention of complainants we restate it to be: Texas has a Board of Water Engineers whose approval is required before any person or agency, including, according to the state statute, the United States, can commence the construction of a dam or reservoir on the rivers of the state; the Rivers and Harbors Act of 1945 shows on its face that the approval of the Neches River and Angelina River projects was made expressly subject to the right of veto by the State of Texas. This argument depends (1) on the general statement of policy in the preamble to the statute quoted above, and (2) on the specific provisions in paragraph (b) which is also reproduced in full above. Texas is a state "lying wholly or partly west of the ninety-eighth meridian." Appellants do not take the position, so far as this contention is concerned, that Congress did not have the *power* to authorize the dam and reservoir without the state's consent, but they say that Congress intended not to do so.

We think the language of the Rivers and Harbors Act is not susceptible of the construction that before the building of the dam the United States must seek

and obtain permission from the Texas Board of Water Engineers.[3]

This act of Congress specifically authorizes the construction of the dam in question without any expressed limitations. On the face of the matter, then, it would seem quite unlikely that the act could be construed as to make possible any requirement that before it was constructed permission of the State of Texas must be obtained. Moreover, the policy statement relied on by appellants as expressing the limitations, shows exactly how it is to be made effective. The statement of policy is followed by this language:

> "In conformity with this policy—
>
> "(a) Plans, proposals or reports of the Chief of Engineers, War Department, for any works of improvement *for navigation or flood control not* heretofore or *herein authorized*, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a) . . . ."

(Then follow detailed provisions for submitting proposals to the states with opportunity to make known the state's views. Nothing is stated that per-

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[3] It will be noted that the Board itself is not a party to this litigation and is not seeking to establish its power of veto over the action of the United States. An interesting question not discussed by the parties and therefore not passed on by us is whether private parties in this kind of litigation have the standing to assert this point, since the right to be vindicated, if it exists at all, belongs to the State of Texas. For all that appears the State considers that the proposed construction is entirely consistent with the stated federal policy.

mits the conclusion that even as to future projects a final disagreement with a state shall stand as a veto of the project.)

> "(b) The use for *navigation*, [note paragraph (a) refers to works of improvement for *navigation or flood control*] *in connection with the operation and maintenance* of such works herein authorized for coonstruction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes."

It is from this statement of policy and the statement of implementation in (b) that appellants spell out an intent by Congress to require the Chief of Engineers to withhold the construction of the dam and reservoir until permission could be obtained from the Texas Board of Water Engineers; and this is in spite of the following language of the Act:

> "The following works [including the one in question] . . . shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers . . . ."

(Followed by a restriction delaying all projects until six months following termination of the war.)

Bearing in mind, as we must, that the authorization of this dam followed years of study and planning, which finally resulted in a report recommending construction, which report was itself made a part of the statute by reference (Senate Document No. 98) it becomes plain that Congress considered that as to the project "herein authorized" due recognition had already been given to the policy of cooperation with the states, and no further restraints were to be placed as to these projects except such as were there specifically included in the Act itself. The only one applicable here was paragraph (b) above.

The restrictions contained in paragraph (b) obviously are not directed to the *construction* of the works in the western states. In fact it refers to them as "work herein authorized for construction." These restraints related only to "operation and maintenance" of the work *after construction*. That this is so seems so apparent that it hardly seems necessary to add the further comment that it is only the "use for *navigation*" in the management and control of the dam and reservoir that is stated to be in some respects made subject to local uses. Even this provision may not be taken to mean that determination whether such management and control is in conformity with the stated purposes is for the state to decide. It is merely a statutory guide for the operation of the facility by the Government after construction. While it must be recognized that Congress can and occasionally does condition its own acts on cooperation with, or subject to the rights of, state governments, *United States v. Gerlach Livestock Co.*, 359 U. S. 725, we

find nothing in the Rivers and Harbors Act of 1945 thus limiting the authorization for construction of this dam and reservoir.

The other contention of appellants is that, conceding that Congress has the constitutional power to build dams and reservoirs in the interest of navigation and flood control, this does not include the power "to add a segment for the generation of hydroelectric power where Congress could not possibly conclude on the facts that the added segment would help pay for the project or would benefit navigation or flood control."

Appellants contend that they have pleaded facts to support their claim that Congress could not possibly conclude that the top segments of this dam would help pay for the project or would benefit navigation or flood control. In view of the fact that Senate Document 98 is pleaded in the complaint and since it is before us for consideration, we view these allegations of "fact" in light of that document. With the report on which Congress acted before us as a part of plaintiffs' own pleading, we are constrained to say that this allegation that Congress could not find that the top segment of the dam would benefit navigation or flood control is a mere conclusion. This is so because there is pleaded by the plaintiffs themselves the Senate Document which contains much material [4] to support its conclusion that:

[4] e.g. Paragraphs 84, 85, 86 of the report which shows the interrelated purpose and the interrelated benefits to be obtained from all of the facilities taken in conjunction with each other:

"84. General.—The water problems in the lower Neches River Valley are due to both floods and low flows. Floods

constitute a considerable hazard to navigation because of the resulting excessive currents in the ship channel which cause collisions and groundings. Floods also are detrimental to navigation in that they cause shoaling in the turning basin and channel. They cause substantial direct damages in the flood plain of the lower river and in the city of Beaumont. Low flows result in shortages of fresh water for municipal, agricultural, and industrial uses. For long periods during dry seasons, the flows are insufficient to adequately dilute the wastes from the oil fields in the upper watershed and the sewage emptied into the river at Beaumont.

"85. It is apparent that the alleviation of these conditions depends upon the storing of a portion of the flood flows for release during periods of low natural flow. Large storage reservoirs are essential to such a plan. The two sites, at Rockland on the Neches River and McGee Bend on the Angelina River, are the only ones favorable for dams that would provide sufficient reservoir capacities. Studies of these two sites indicate that sufficient storage could be obtained at either one of the sites to provide the regulation in stream flow necessary to meet the present demands for water. However, control of either the Upper Neches River or Angelina River, alone, would afford only partial navigation and flood-control benefits as either stream is capable of producing floods on the lower river. Further, the regulation of only one stream would make the inclusion of power production in the plan uneconomical, as the operation of the reservoir to meet the seasonal demands for water would reduce materially the prime energy output. With dams on both streams, the operation to provide the maximum amount of prime energy would release at all times the water required to meet the demands downstream The proposed plan of improvement, which includes dams at both sides, would effect a large measure of flood control and would provide an adequate flow in the lower river during periods of low natural flow, and thus would practically solve the water problems in the lower watershed. In addition, the proposed plan would permit the development of a large amount of firm power.

"86. The proposed plan is designed to coordinate in the best manner the several purposes of the dams and to achieve the maximum benefits therefrom. In addition to the large dams proposed, it is desirable to include two small dams

downstream for the regulation of the fluctuating discharges from the generating plants, and it was found that these dams could be justified for power production alone."

"a plan of improvement for the lower Neches River that provides for a dam and reservoir on the Neches River near Rockland, Tex., a dam and reservoir on the Angelina River near McGee Bend, and two dams on the Neches River below Rockland would:

"(a) Benefit existing navigation on the Neches River by alleviating conditions that cause delays to shipping and accidents to vessels.

"(b) Reduce the cost of maintenance of the improved channel in the Neches River.

"(c) Make possible the navigation of the Neches River by light-draft craft for about 90 miles above Beaumont.

"(d) Provide considerable flood protection to the valley below the proposed dams.

"(e) Assume an adequate and dependable supply of water in the river for municipal and industrial purposes, and for the irrigation of a large acreage of rice land.

"(f) Make possible the development of a large amount of hydroelectric power.

"(g) Afford considerable benefits for wildlife conservation and recreational purposes, pollution abatement, and other benefits incidental to those stated above.

"179. The district engineer concludes that the benefits to be derived from the proposed improvements would greatly exceed the costs."

This pleading completely refutes the allegation that Congress could *not* have found that this particular dam would benefit navigation or flood control. We do not, we cannot, go behind Congress' determination to build this dam as a part of a coordinated plan of improvement of a river valley to determine how many feet of the dam are necessary for navigation, how many for flood control and how many for power, in order to isolate the top twenty five feet as being for an unconstitutional purpose. This has been authoritatively settled in *State of Oklahoma v. The Atkinson Co.*, 313 U. S. 508. We have considered appellants' argument that the Oklahoma case is distinguishable on the basis that there it was said that "power paid the way" for the construction, the argument here being that power demonstrably couldn't "pay the way" or even "pay its own way" if the particular dam is considered separately from the others. The recommendation of the report on which Congress acted is to the effect that the power of the several dams would make a substantial contribution to the annual charges. We cannot "exercise a legislative judgment based on a complexity of engineering data," *Oklahoma v. Atkinson, supra*, p. 527, in order to ascertain just what part the top twenty five feet of the dam contributes to the whole, either by increasing the power generated at its site or in stabilizing the flow to the generating sites down river, which are all part of the same develop-

ment. See also, in this connection, *United States v. Twin City Power Co.*, 350 U. S. 222, 224. "Whether the particular structures are normally necessary is not for this court to determine." *Arizona v. California*, 283, 456.

We hold that the projected dam was authorized by the Rivers and Harbors Act of 1945 without the necessity of obtaining permission for its construction from the Texas Board of Water Engineers, and that the dam and reservoir, as authorized by Congress, was not beyond the Congressional power to build.

The judgment is AFFIRMED.

JUDGMENT

Extract from the Minutes of February 13, 1958

R. P. ANDERSON, ET AL.

No. 16799. versus

BRIGADIER GENERAL L. E. SEEMAN,
Division Engineer, Southwest Division,
Corps of Engineers, United States Army,
et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Office - Supreme Court, U.S.
FILED
JUN 23 1958
JOHN T. FEY, Clerk

No. [redacted] 122

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,799

R. P. ANDERSON, ET AL.,
Appellants,

v.

BRIGADIER GENERAL L. E. SEEMAN,
Division Engineer, Southwest Division, Corps of Engineers, United States Army, et al.,
Appellees.

Appeal from the United States District Court For the Northern District of Texas

APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF

U. S. COURT OF APPEALS
FILED
MAR 12 1959
EDWARD W. WADSWORTH
CLERK

JOYCE COX
JOHN W. STAYTON
J. CHRYS DOUGHERTY
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,799

R. P. ANDERSON, ET AL.,
Appellants,

v.

BRIGADIER GENERAL L. E. SEEMAN, Division Engineer, Southwest Division, Corps of Engineers, United States Army, et al.,
Appellees.

Appeal from the United States District Court
For the Northern District of Texas

APPELLANTS' PETITION FOR REHEARING

R. P. Anderson, et al, appellants, respectfully petition the Court to grant them a rehearing; to set aside the judgment heretofore rendered in this case on February 13, 1958; and to reverse the judgment of the district court; and at all events, to modify the Opinion delivered herein on February 13, 1958, so as to eliminate therefrom the holdings adverse to plaintiffs which are hereinafter complained of.

The Constitutional Questions.

1. By their pleadings plaintiffs assumed the burden of proving that the proposed power increment would yield not a profit but an economic loss, *and* that it would not benefit either flood control or navigation. Besides, plaintiffs thereby assumed the further burden of proving that there is no reasonable basis for contrary findings by Congress. The Court has erred in holding, in effect, that plaintiffs are not entitled to their day in court to prove the facts alleged.

2. The Court's holding that Senate Document 98 "refutes the allegation that Congress could *not* have found that this particular dam would benefit navigation or flood control" implies an incorrect criterion. Senate Document 98 does not refute the charge, supported by averments of facts, that the *power increment* will neither yield a profit nor benefit navigation or flood control. It matters not that despite the power increment the dam may benefit flood control or navigation.

3. The Court has erroneously concluded that the judicial function does not include the power to determine that a given segment of this multipurpose dam has been added for an unconstitutional purpose.

4. The Court's opinion (p. 13) states: "the recommendation of the report on which Congress acted is to the effect that the power of the several dams would make a substantial contribution to the annual charges." If this means that the report states in effect that the power would contribute a substan-

tial *net* profit such interpretation of the report is erroneous.

5. The Court erred in holding that in view of appellants' "pleading" of Senate Document 98 the "allegation that Congress could not find that the top segment of the dam would benefit navigation or flood control is a mere conclusion."

6. The Court erroneously holds, in effect, that affirmance is required because the Court cannot "'exercise a legislative judgment based on a complexity of engineering data,' *Oklahoma v. Atkinson*, *supra*, p. 527, in order to ascertain just what part the top twenty-five feet of the dam contributes to the whole, either by increasing the power generated at its site or in stabilizing the flow to the generating sites down river, which are all part of the same development."

7. The error of the Court in holding that plaintiffs' challenge of the proposed power increment has been authoritatively settled against plaintiffs in *State of Oklahoma v. Atkinson Co.*, 313 U.S. 508.

8. The Court's holding "that the dam and reservoir, as authorized by Congress was not beyond the Congressional power to build" is erroneous.

The Statutory Questions.

(In support of the following grounds, 9-13, we respectfully refer to the argument in support of appellant's petition for rehearing in the companion case of Neches River Conservation District v. General Seeman, et al, No. 16,661).

9. The error of the Court in holding that there is nothing in the Rivers and Harbors Act of 1945 limiting the authorization for construction of McGee Bend dam and reservoir, or conditioning such construction on cooperation with state governments or making it subject to the rights of state governments.

10. The error of the Court in holding that defendants are authorized by the Rivers and Harbors Act of 1945 to proceed with the construction of McGee Bend dam and to control the waters of the Angelina River without first obtaining a permit from the Board of Water Engineers of the State of Texas.

11. The error of the Court in holding that paragraph (b) of the Rivers and Harbors Act of 1945 "is merely a statutory guide for the operation" of McGee Bend dam after construction and that it is not intended that the state determine whether such operation and maintenance conflicts with local beneficial consumptive uses.

12. The error of the Court in failing to hold that the complaint shows a sufficient right in plaintiffs to challenge the actions of defendants as being unauthorized by the statute under which they purportedly are operating.

13. The error of the Court in holding, in effect, that the complaint fails to assert a claim on which relief could be granted.

WHEREFORE, appellants pray that the judgment of this Court entered herein on February 13, 1958, be set aside; that a rehearing be granted, and (a) that the judgment of the District Court be reversed; and (b) at all events that the Opinion delivered herein on the same day be modified so as to eliminate therefrom the holdings adverse to plaintiffs which are complained of herein.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF COUNSEL

This petition for rehearing is not filed for purposes of delay, but is presented in good faith and in the belief that it is meritorious and that the assignments of error are well taken.

Ireland Graves

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

The power of Congress to determine whether the hydro-electric increment shall be included in McGee Bend dam and reservoir is broad, but not unlimited.[1] If the question lies within the realm of judgment or discretion, the process of deciding it is a legislative one and the decision of Congress is perforce conclusive. On that hypothesis, the attempt in *Oklahoma v. Atkinson*, 313 U. S. 508, to invoke the judicial process for an independent re-determination of the questions that had been legislatively decided was rejected. But the rejection was firmly posited on the foundation that the judicial function was not available to overturn or disturb the legislative *judgment*. The Court was at pains to exhibit the circumstances that gave character to the legislative action as an exertion of legislative discretion, and not an exercise of arbitrary power. These were supplied, in main if not wholly, by H. Doc. No. 541 (Report) by which it was demonstrated that the project was adequately supported, legally, on two grounds: First, that, as estimated by the Division Engineer, the power phase would yield an annual profit of $404,310 to apply against an annual deficit from

[1] "The role of the judiciary in reviewing the legislative judgment is a narrow one in any case." *United States v. Twin City Power Co.*, 350 U.S. 222, 224. This implies that even the power of legislative judgment is not limitless. Besides, it is in the realm of *judgment* that the legislative power is so extensive. This is short of *absolute* power.

flood control of $287,000. 313 U. S. p. 520.[2] And, second, "it was plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood control benefits, including river flow, which would accrue were the dam to be erected for flood control only." 313 U. S. p. 529.

It can not be gainsaid that since power contributed to flood control benefits (legitimate aids to commerce), the Red River project was sustained as primarily a flood control project. But the Court said also: "We have recently recognized that 'Flood protection, watershed development, *recovery of the cost of improvements through utilization of power* are * * * parts of commerce control.'" (Emphasis supplied). And fifteen years later—two years ago—this was quoted again in *United States v. Twin City Co.*, supra, p. 224.

In *Oklahoma v. Atkinson*, supra, the Court also remarked that the District Engineer stated (in H. Doc. 541, p. 67) that flood control benefits would be augmented by those resulting from regulated power discharge. 313 U. S. p. 530. Appellees in our case cited this as a legal precedent for a similar holding here. But this Court properly refused to transplant the Red River Report into this record. Moreover, S. D. 98 affirmatively recognizes that the power increment at McGee Bend dam would pro-

[2] Allowing full scope for different methods of distributing costs between flood control and other purposes, it was not disputed that, at all events, the power phase of the Denison dam and reservior yielded a net profit.

duce an *irregular flow*, which would need re-regulating at Dam B, on the Neches.[3]

As to the Red River project, Congress having been supplied (by H. Doc. 541) with a two-fold basis for its legislative judgment, no amount of evidence placed before the court at a trial, anew, would have been effective to overturn the action of Congress.

This Court in reaching a decision has taken into account Senate Document 98, as in *Oklahoma v. Atkinson, supra*, the Court considered H. Doc. 541.[4] We think that this in each instance was inescapable. However, we earnestly insist that the Court has erred in concluding (Opinion p. 10) that Senate Document 98 has transformed into *a mere conclusion* —despite the supporting particulars—the allegation "that Congress could not possibly conclude that the top segment of this dam would benefit navigation or

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[3] "In addition to the large dams proposed, [McGee Bend and Rockland] it is desirable to include two small dams downstream for the regulation of the *fluctuating discharges from the generating plants,* and it was found that these dams [A and B] could be justified for power production alone." S. D. 98, p. 36. (Emphasis supplied.) The need of so regulating the fluctuating discharges from the turbines of the large dams is repeated at pages 4, 7, 39, 48, 51, of S. D. 98.

[4] In *Oklahoma v. Atkinson* plaintiff did affirmatively plead H. Doc. 541, bodaciously importing it into its complaint, attaching a copy as an exhibit. In the present case plaintiffs allege that *defendants* are relying, in support of their actions, upon the Rivers and Harbors Act of 1945 (in which Senate Doc. 98 is incorporated by reference). On the statutory issue plaintiffs allege *and* contend that the statute on which defendants rely conditions their right to construct the dam on the issuance of a permit from the Texas Board of Water Engineers, (R. 5, 11, 19). It is respectfully submitted that this does not amount to a "pleading" of S. D. 98 in such a way as to penalize plaintiffs in the manner stated in the Court's opinion.

flood control." The allegation, in context, is this: "The power increment does not contribute to either navigation benefits or flood control benefits. Insofar as it would have any effect at all on flood control or navigation, it would be detrimental *in that* the larger reservoir would tend to increase both the peak flood flow and the total run-off which must be provided for in the design for flood control. There is no reasonable basis for contrary findings." (R. 7, 16, 23; emphasis supplied).

Putting to one side the Court's view that plaintiffs "pleaded" Senate Document 98, and the effect of such pleading as viewed by the Court, we respectfully insist that there simply is no irreconcilable conflict between S.D. 98 and the positive allegations (buttressed by particulars) that the power increment *would not* yield a profit, and *would not* augment flood control or navigation benefits. Senate Document 98 does not refute such allegations.

It will not do to say that the dam, notwithstanding and despite the burden of the power increment, will still benefit flood control and navigation. This does not justify the power increment, a *non*-commerce purpose, unless it is justified in one of the ways mentioned.

This brings us to the Court's holding (p. 13) that the Court "'cannot exercise a legislative judgment based on a complexity of engineering data,' *Oklahoma v. Atkinson, supra*, p. 527, in order to ascertain just what part the top twenty-five feet of the dam contributed to the whole, either by increasing

the power generated at its site, or in stabilizing the flow to the generating sites down river, which are all part of the same development."

This holding presupposes that, as was true of the record in *Oklahoma v. Atkinson*, the record in the present case presents an *issue* of fact, created by a complexity of engineering data, that is susceptible of resolution by an exercise of legislative *judgment*. If that were true, the Court could hardly do other than affirm the judgment on the authority of *Oklahoma v. Atkinson*. But such is not the case. In *Oklahoma v. Atkinson*, plaintiff assailed the Denison Reservoir legislation of 1938 by challenging the correctness of the engineering conclusions as expressed in H. Doc. 541. It tendered an *issue* of fact, seeking findings in conflict with those in H. Doc. 541. The Court, recognizing that this was but an attempt to obtain a judicial revision of an adequately supported legislative decision, simply declined to take jurisdiction. The two basic findings made by Congress have been noted above. Either finding thus supported was not reviewable in court. If in the present case either of these conditions had been met (e. g. by evidence contained in S. D. 98) *Oklahoma v. Atkinson* would have been a precedent for similar disposition of this case. Neither condition was satisfied.

Besides, our pleading is not confined to a charge of the absence of the two factual conditions. It goes further. Anticipating a claim that there was relevant evidence before Congress from sources other than S. D. 98, our complaint charges that there was

no basis of fact *from any source* that could support such Congressional determination. Again, no such allegation is to be found in Oklahoma's pleadings. The reason for its absence is patent: H. Doc. 541 refutes it.

Now, appellants recognize that if the most they are able to achieve on a trial is to present substantial evidence supporting the allegations relied upon, creating no more than an issue of fact tending to support a favorable determination, this will not suffice. Unless we can establish the requisite facts without dispute we shall fail.

Unless we can establish *irrefutably and without dispute* that a given segment of the dam, as planned, will serve power at a loss and not at a profit, without augmenting flood control or navigation benefits, we shall not be entitled to prevail. If, *per contra*, we are able to establish such facts beyond cavil, not depending upon a resolution of complex engineering disputes, but resting upon undisputed and irrefutable evidence, we shall be entitled to prevail.

In seeking an opportunity to discharge this burden plaintiffs present for decision a case that has not been foreclosed against us by *Oklahoma v. Atkinson*, or by any other case that has been cited by appellees or that we have been able to discover.

In the face of plaintiffs' allegations it can not be assumed that the utmost that plaintiffs will be able to establish is an *issue*, engendered by a complexity of engineering data. The plaintiffs' pleadings entitle

them to try their case "on the proofs." *Des Isles v. Evans*, 200 F. 2d 614, 615 (5 Cir.); *De Loach v. Crowley's Inc.*, 128 F. 2d 378, 380 (5 Cir.).

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The undersigned certifies that a copy of this petition for rehearing and brief in support thereof has been served upon Appellees, by forwarding, by first-class mail, a copy to each of their attorneys of record, namely: Messrs. Perry W. Morton, Assistant Attorney General, Washington, D. C.; Heard L. Floore, United States Attorney, Fort Worth, Texas; David R. Warner and Alfred H. O. Boudreau, Jr., Attorneys, Department of Justice, Washington, D. C.

Ireland Graves

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 122

R. P. ANDERSON, ET AL., PETITIONERS

v.

BRIGADIER GENERAL L. E. SEEMAN, DIVISION ENGINEER, SOUTHWEST DIVISION, CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 252 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered February 13, 1958. Rehearing was denied March 27, 1958. The petition for a writ of certiorari was filed June 23, 1958. The Jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1945 requires that a permit be obtained from the State of Texas as a condition precedent to the construction in Texas by the United States of a dam in navigable waters of the United States.[1]

2. Whether, in the case of federal dams erected primarily in the interests of flood control and navigation, Congress may authorize the generation of hydroelectric power as part of the entire plan.

STATUTE INVOLVED

The pertinent provisions of the Rivers and Harbors Act of 1945, 59 Stat. 10, are set forth in Appendix A to the petition at pages A1–A5.

STATEMENT

This is a suit brought by a number of plaintiffs, petitioners here, whose lands would allegedly be inundated by the construction of McGee Bend Reservoir, to enjoin the taking of their lands for purposes of that reservoir. The reservoir has been authorized by Congress to be constructed at the direction of the Secretary of the Army and under the supervision of the Chief of Engineers. Rivers and Harbors Act of 1945, 59 Stat. 10, 11, 18. The respondents are the Division Engineer of the Southwest Division, Corps of Engineers, and the District Engineer

[1] This question is discussed in respondents' brief in opposition in the companion case of *Neches River Conservation District, Petitioner*, v. *Brigadier General L. E. Seeman, Division Engineer, Southwest Division, Corps of Engineers, United States Army, et al.*, No. 121, to which the Court is respectfully referred.

of the Fort Worth District of that Division. The United States is not a party to this suit.

Petitioners assert that Congress has no constitutional power to authorize the generation of hydroelectric power under the circumstances allegedly here prevailing, i. e., that the generation of power will neither contribute to the improvement of navigation nor the control of floods on the river and, in addition, will prove economically unjustifiable. Because of this, it is said that the Rivers and Harbors Act of 1945, insofar as it authorizes the construction of McGee Bend Dam and Reservoir in accordance with the plan submitted by the Chief of Engineers, is unconstitutional.

In the Rivers and Harbors Act of 1945, 59 Stat. 10, 18, Congress, by adoption of the plans contained in Senate Document No. 98, 76th Congress, 1st Session, which is a report of the Chief of Engineers, authorized the construction of a project of four dams on the Neches-Angelina system. The plans provide for two large dams, one on the Neches River at Rockland and one on the Angelina at McGee Bend (that here at issue) and two smaller reregulating dams on the Neches below Rockland. The basic aims of the project are these:

> * * * First, to control floods from the upper basin, thereby reducing flood losses in the lower valley and benefiting navigation below Beaumont; and second, to regulate stream flow, thereby making available needed water supplies for the area in the vicinity of Beaumont, providing depths in the Neches River above Beau-

mont suitable for shallow-draft navigation, and making possible the development of a substantial block of hydroelectric power. * * *

Since completion of one of the smaller re-regulating dams in 1951, the Congress has appropriated some $5,500,000 for the construction of McGee Bend. (See Public Works Appropriation Bill, House Report No. 1085, adopted in Public Law 163, 84th Congress, 1st Session, and Public Works Appropriation Bill, House Report No. 2413, page 11, adopted in Public Law 641, 84th Congress, 2nd Session.). The most recent action has been the rejection by the House, after debate, of an amendment to the Public Works Appropriation Bill for 1959 which would have eliminated the power feature of McGee Bend Dam. (Cong. Rec., daily ed., June 19, 1958, pages 10635–10637.)

Respondents filed a motion to dismiss, alleging some six separate grounds (R. 25, 27). The motion was granted by the District Court on May 20, 1957. The Court of Appeals, holding that the dam and reservoir, as authorized by Congress, was not beyond the Congressional power to build, affirmed the judgment of dismissal on February 13, 1958.

ARGUMENT

1. This case cannot be distinguished on the facts or the law from *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The single factual difference of any note is that, while in that case only one dam was projected, here there are four. Both the Denison Dam there involved and McGee Bend here at issue are multiple-purpose dams and both were authorized basically for

the purpose of flood control.[2] See *Oklahoma* v. *Atkinson Co.*, at 520, 529. On the basis of this Court's decision in that case, as well as in *Arizona* v. *California*, 283 U. S. 423, and *United States* v. *Twin City Power Co.*, 350 U. S. 222, the court below could not have ruled other than it did.

Even the pleadings in these two cases are similar. In this case the complaint alleges that an "additional segment for the purpose of developing hydroelectric power" is "superimposed" (R. 6, 12) or "superadded" (R. 7, 16) "on top of a so-called flood control and water conservation dam" (R. 7, 16). In *Atkinson* the complaint alleged that, under the War Department's survey, the first 110 feet of the dam was to be used for the development "solely and exclusively" of water power, while 40 feet "superimposed" on the power reservoir were to be used "solely and exclusively" for flood control. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 513. In both cases the allegations are that different portions of the same dam and reservoir will be dedicated to independent uses.[3] In short, the contention is made here, as it was in *Atkinson*, that the generation of power will not improve navigation or control floods.

In an attempt to distinguish *Oklahoma* v. *Atkinson Co.*, petitioners here allege that "Congress could not

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[2] McGee Bend Dam is to be built also "in the interest of national security and the stabilization of unemployment," (Section 2 of the Rivers and Harbors Act of 1945, 59 Stat. 11, 12), and its construction is therefore also an exercise of the war and general welfare powers of Congress.

[3] Oklahoma picked the lower portion of the dam as its target; here, petitioners pick the top.

possibly conclude" that the generation of power would contribute toward "recovery of the cost of improvements" as would aid flood control or navigation." Petition, page 7. That allegation that "Congress could not possibly conclude" was made in an effort to meet the following language of this Court's opinion in *United States v. Twin City Power Co.*, 350 U. S. 222 at 224:

> The Court of Appeals concluded that the improvement of navigation was not the purpose of the taking but that the Clark Hill project was designed to serve flood control and water-power development. 215 F. 2d at 597. It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. See *Arizona v. California*, 283 U. S. 423, 455–457. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman v. Parker*, 348 U. S. 26, 32; *United States ex rel. TVA v. Welch*, 327 U. S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown "to involve an impossibility," as Mr. Justice Holmes expressed it in *Old Dominion Co. v. United States*, 269 U. S. 55, 66.

The Court of Appeals applied precisely these principles. It concluded that there was ample basis, as shown by Senate Document No. 98, for concluding that power generation would serve the interests of

navigation and flood control. Petitioners' attempted isolation of the McGee Bend Dam from the rest of the project,[4] their assertions as to power production, and their prediction as to future revenue, all represent merely disagreements with the wisdom of Congress. As the court below said, "The recommendation of the report on which Congress acted is to the effect that the power of the several dams would make a substantial contribution to the annual charges."

2. Since the Rivers and Harbors Act of 1945, properly construed, does not forbid the respondent officers from proceeding to construct the dam without first obtaining the consent of Texas thereto,[5] those officers were acting within the scope of statutory authority, *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682, and the suit is in reality one against the United States, which has not waived its sovereign immunity.

Moreover, petitioners cannot show that they will suffer irreparable injury, *United Gas Co.* v. *R. R. Commission,* 278 U. S. 300; *Berman* v. *Parker,* 348 U. S. 26; or that they have no plain, adequate and complete remedy at law, *State of Georgia* v. *City of Chattanooga,* 264 U. S. 472, in the Court of Claims or in condemnation proceedings. Furthermore, where

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[4] "Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river." *Oklahoma* v. *Atkinson Co., supra,* at 525. See also *Berman* v. *Parker,* 348 U. S. 26, 34–35; *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, 552.

[5] See brief in opposition in the companion case of *Neches River Conservation District* v. *Seeman,* No. 121, pp. 7 to 11.

the possibility of raising the constitutional issue in future condemnation proceedings exists; suit for an injunction is premature, *Cavanaugh* v. *Looney*, 248 U. S. 453.

And, again, the Secretary of the Army is an indispensable party. If respondents are enjoined from constructing the dam, his actions will be controlled thereby because he is under a direction to prosecute this project "as speedily as may be consistent with budgetary requirements" (Section 2 of the Rivers and Harbors Act) and either he or a subordinate of his at his direction would then be obliged to take the affirmative action of seeking permission to build from the Texas Board of Water Engineers. But the Secretary is not, and cannot be made, a party to this action, *Blackmar* v. *Guerre*, 342 U. S. 512.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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IN THE

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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1. Petitioners' contentions have been misunderstood.

Petitioners do not seek judicial review of a determination by Congress of the *dimensions* of a flood control or navigation dam to be constructed at McGee Bend. They seek to prevent the inclusion of a *power segment* in such a dam because that power seg-

ment will *not* contribute to flood control benefits, will *not* contribute to navigation benefits, *and* will *not* contribute toward defraying the cost of the project as a whole. If Senate Document 98 supported the addition of power *on any of these three grounds* plaintiffs' point would be foreclosed. In that event the courts "should respect that decision" of Congress, supported by the Engineers' report, since it would *not* "involve an impossibility." But Senate Document 98 furnishes *no* such foundation for the decision to add the power segment.

And petitioners' pleadings, which for present purposes must be taken as true, assert that there is *no* basis in fact for a finding by Congress, or anyone, that the power segment performs any of the three crucial functions.

This does not lead to a substitution of a *judicial* decision for a *congressional* one as to the dimensions of a dam constructed in the interest of flood control or navigation. Petitioners seek no such obtrusion. They seek only an opportunity to prove what they have alleged; i. e., that Congress has authorized what is in part a power dam, when the power segment of it serves no constitutional purpose. The only question of law here presented is whether production of power at a loss by the addition of a segment—at top or bottom, or in the middle—which does not aid either flood control or navigation, is constitutional. Petitioners assert that it is not. *Oklahoma v. Atkinson*, 313 U. S. 508 is not *contra*.

The *fact* question of whether Congress could *possibly* conclude that the power segment would benefit flood control or navigation, or contribute toward re-

covering the cost of the project as a whole, must await trial. No such fact issue was tendered in *Oklahoma v. Atkinson.*

2. Respondents' contention (in this case and in the companion NRCD case) that dismissal should be affirmed because these are suits against the United States, and because the Secretary of the Army is an indispensable party have been properly disposed of by the Court of Appeals. Opinion of Court, Appendix B to Petition, pages A16-A17. 252 F. 2d at 322-323.

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